TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 125.

GEORGE C. RANKIN, RECEIVER OF THE HUTCHINSON NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

EDWARD E. BARTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED NOVEMBER 25, 1904.

(19,539.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1905.

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 20th day of July, 1903, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition in error and transcript of the record from the district court of Reno county together with the waiver of the issuance of summons in error and entry of appearance of defendant in error which petition in error and transcript of the record and waiver are in words and figures as follows to wit:—

2 In the Supreme Court of Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error. } No. 13691.

Entry of Appearance.

We hereby waive issuance — summons in error and enter our appearance for defendant in error.

VANDEVEER & MARTIN,
Attorneys for Defendant in Error.

Filed Jul- 20 1903

D. A. VALENTINE,
Clerk Supreme Court.

3 Filed Jul- 20, 1903. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error. } No. —.

Petition in Error.

Now comes plaintiff in error, George C. Rankin, receiver, and says that he is the duly authorized and appointed receiver of the Hutchinson national bank, qualified under the laws of the United States as such, and brought suit against Edward E. Barton, a stockholder in said bank, in the district court of Reno county, Kansas; but, by the consideration of the judge of said district court, acting as a court, the said plaintiff in error was defeated in said action; demurrers to his petition and amended petition were sustained by the said district court; and, upon motion of the defendant in error, the action of plain-

tiff in error was dismissed and the costs of suit, in amount, $11.05, were taxed up to plaintiff in error.

The plaintiff in error excepted to all of the rulings and orders of the said court; and avers that the said court erred as follows:

1. In sustaining the demurrer of defendant in error to the original petition filed by plaintiff in error.

2. In sustaining the demurrers filed by defendant in error to the amended petition of plaintiff in error.

3. In rendering the judgment of dismissal against plaintiff in error and taxing him up with the costs of the action, upon motion of defendant in error.

The plaintiff in error avers that he has attached hereto a transcript of the record of the proceedings in the district court of Reno county, Kansas, duly certified under the hand and seal of the clerk of said court, and he makes the same a part of this petition in error.

He prays that this court consider and reverse the rulings and judgment of the district court of Reno county and restore to plaintiff in error all things which he has lost by reason of the rulings and judgment of the district court of Reno county, Kansas.

H. WHITESIDE,
Attorney for Plaintiff in Error.

4 STATE OF KANSAS, } ss:
Reno County, }

In the District Court in and for said County.

GEO. C. RANKIN, Receiver, Plaintiff,
vs.
EDWARD E. BARTON, Defendant. } Præcipe for Summons.

The clerk of said court will issue a summons in the above entitled action against defendant Edward E. Barton, pl'ff will take judgment for $627. with interest from Nov. 20, 1900 & costs.

Direct to the sheriff of the county of Reno, State of Kansas, and returnable according to law.

H. WHITESIDE,
Attorney for P'ff.

Filed Nov. 13, 1902

J. M. WYMAN,
Clerk of the Dist. Court.

Filed Jul- 20 1903

D. A. VALENTINE,
Clerk Supreme Court.

5 Filed Jul- 20, 1903. D. A. Valentine, Clerk Supreme Court.

In the District Court, Reno County, Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff,
vs.
EDWARD E. BARTON, Defendant.

Petition.

Plaintiff, George C. Rankin, avers that he is the duly elected and qualified receiver of the Hutchinson national bank, a corporation, organized under the laws of the United States, and which once did business at Hutchinson, Kansas; that said banking association became insolvent in 1893 and its assets passed into the hands of the receiver for distribution among its creditors, with the balance, if any, to go to the stockholders; that on July 19, 1894, after an accounting by the receiver with the Comptroller of the Currency of the United States, it was found necessary by said Comptroller, in order to pay the just debts of said association, to make an assessment of ($75,000) seventy-five thousand dollars upon the individual liability of the stockholders of said bank and enforce the said liability to said extent, being seventy-five dollars ($75.00) on each share of stock held.

Your petitioner further avers that after the application of the amounts collected upon individual liability, by reason of said assessment, and from any remaining assets of said bank, it was found, after further accounting by the receiver with the Comptroller of the Currency, that it was and would be necessary, in order to pay the just debts of said bank remaining unpaid, to further enforce the individual liability of the stockholders to the extent of nineteen thousand dollars ($19,000.00), or nineteen dollars ($19.00) upon each share of stock held or owned by said stockholders; and duly advised in the premises, on November 20, 1900, the Comptroller of the Currency did make said assessment and requisition and did then and there demand of the stockholders nineteen dollars ($19.00) upon each share of stock by them held or owned in said bank.

(The following paragraph inserted as an amendment to the petition, by leave of the court.)

That said assessment was made just as soon as discovered in the exercise of diligence to be necessary and just as soon as it was ascertained the first assessment and the assets of the bank were insufficient.

6 Your petitioner further avers that the defendant, Edward E. Barton, held and owned thirty-three (33) shares of stock in said bank of the par value of thirty-three hundred dollars ($3300.00), and his individual contribution necessary to pay the debts of said association and satisfy the said assessment last above mentioned, as a stockholder, was six hundred twenty-seven dollars ($627.00), and

that his liability is now said sum, with interest from November 20, 1900.

Plaintiff avers that, duly authorized and directed by the said Comptroller to enforce said assessment and liability, by suit or otherwise, he has repeatedly since November 20, 1900, made a demand on defendant for said sum, with interest, but the said defendant has neglected and refused to pay the sum, or any part thereof.

Wherefore, plaintiff prays judgment against defendant for the sum of six hundred twenty-seven dollars ($627.00), with interest at six (6) per cent. from November 20, 1900, and costs of suit, also prays judgment for general relief.

H. WHITESIDE,
Attorney for Plaintiff.

Endorsed: Copy. $10 approved as deposit for costs & that and filed—No. 8930 District court, Reno county, Kansas. George C. Rankin, receiver, plaintiff, *vs.* Edward E. Barton, defendant. Filed Nov. 13 1902 J. M. Wyman clerk of the dist. court. H. Whiteside att'y for plaintiff. Amendment filed 3/6–1903 J. M. Wyman, clerk. By Amy J. Alexander, deputy.

7 Summons.

STATE OF KANSAS, } ss:
Reno County, }

The State of Kansas to the sheriff of Reno county, Greeting:

You are hereby commanded to notify Edward E. Barton that he has been sued in the district court, within and for the county of Reno, in the ninth judicial district of the State of Kansas, and must answer the petition filed by the plaintiff, Geo. C. Rankin, receiver on or before the 15″ day of Dec. A. D. 1902, or the said petition will be taken as true and judgment rendered accordingly. And return this writ on the 25″ day of Nov. A. D. 1902.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office at Hutchinson, in said county, this 15″ day of Nov. A. D. 1902.

[SEAL.]

J. M. WYMAN,
Clerk of the District Court, Reno County, Kansas,
By AMY J. ALEXANDER, Deputy.

STATE OF KANSAS, } ss:
County of Reno, }

Received this writ Nov. 15, 1902. And I summoned the following persons of the defendants within named, at the times following, to wit:

Edward E. Barton, Nov. 15 1902, by leaving at the usual place of residence of said defendant, in said county, a true copy of the within summons with all the endorsements thereon.

W. E. LONG, Sheriff,
By W. W. LEWIS,
Under Sheriff.

(Endorsed:) Copy. No. 8930. Geo. C. Rankin, receiver, plaintiff, *vs.* Edward E. Barton, defendant. If the defendant fail to answer, the plaintiff will take judgment for $627.00 with interest thereon at the rate of 6 per cent. per annum from the 20″ day of Nov. A. D. 1900, and costs of suit. J. M. Wyman, clerk. By Amy J. Alexander, deputy. Issued No. 15″ 1902 Returnable Nov. 25″ 1902 Filed Nov. 17 1902 J. M. Wyman clerk.

Sheriff's Fees.

Serving first person	50
One copy of summons	25
1st person 4, miles	40
Total	$1.15

W. E. LONG, Sheriff.
W. W. LEWIS,
Under Sheriff.

8 Copy.

In the District Court of Reno County, Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff,
vs.
H. D. WINSLOW, Defendant. } No. 8929.

Now on this 3rd day of February, 1903, upon good cause shown, this case is continued for the term.

Endorsed: Copy. 8930. Rankin, rec. *vs.* Winslow J. E. of continuance Filed Feb. 3, 1903. J. M. Wyman clerk.

9 In the District Court of Reno County, Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff,
vs.
EDWARD E. BARTON, Defendant. } No. 8930.

Demurrer.

Comes now the defendant, Edward E. Barton, by his attorneys, Vandeveer & Martin, and demurs to the plaintiff's petition herein

for the reason that said petition does not state facts sufficient to constitute a cause of action against this defendant.

VANDEVEER & MARTIN,
Attorneys for Defendant.

Endorsed: Copy. No. 8930. George C. Rankin, receiver, plaintiff, *vs.* Edward E. Barton, Defendant. Demurrer. Filed Dec. 13 1902 J. M. Wyman clerk of the dist. court.

10 Copy.

In the District Court of Reno County, Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff,
vs.
EDWARD E. BARTON, Defendant. } No. 8930.

Demurrer.

Comes now the defendant, Edward E. Barton, by his attorneys Vandeveer & Martin, and demurs to the plaintiff's amended petition for the reason that said amended petition does not state facts sufficient to constitute a cause of action.

Defendant further demurs to said amended petition for the reason that said amended petition shows upon its face that the plaintiff's cause of action is barred by the statute of limitations.

VANDEVEER & MARTIN,
Attorneys for Defendant.

Endorsed: Copy. No. 8930. George C. Rankin, receiver, plaintiff, *vs.* Edward E. Barton, defendant. Demurrer. Filed Mar. 11 1903 J. M. Wyman, clerk of the dist. court.

11 In the District Court of Reno County, Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff,
vs.
FRANK BARTON, Defendant. } No. 8930.

Now on this 3rd day of February, 1903, this cause came on to be heard on demurrer of defendant to plaintiff's petition, for the reason that the said petition does not state facts sufficient to constitute a cause of action against this defendant.

Plaintiff present by counsel H. Whiteside and defendant present by counsel Vandeveer & Martin and after argument by the counsel and the court being fully advised, did sustain said demurrer to which plaintiff excepts and the plaintiff asks and is given until

March 3rd to elect whether to amend his petition or to appeal from the decision of the court and the case is passed until March 3rd, 1903, for further proceedings.

Filed Feb. 3, 1903.

J. M. WYMAN,
Clerk of the District Court.

12 In the District Court of Reno County, Kansas.

GEO. C. RANKIN, Receiver, Plaintiff,
vs.
E. E. BARTON, Defendant.

APRIL 23, 1903.

The demurrer of defendant to the amended petition of plaintiff which was filed by leave of the court, on March 6, 1903, came on for hearing at this date.

Plaintiff appearing by H. Whiteside, Esq., and the defendant by Vandeveer & Martin. After argument of council the court doth sustain the said demurrer on both grounds therein mentioned to which ruling of the court plaintiff then and there excepted and elected to stand on his amended petition.

Whereupon at request of defendant the court dismissed the action of plaintiff and taxed the costs of suit in amount $11.05, to plaintiff, to which ruling and judgment the plaintiff did then and there except and his exceptions as well as prior exceptions were duly allowed.

In order that plaintiff may file his petition in error in the Supreme Court and give a supercedeas bond, execution is stayed thirty days O. K.

V. & M.

Filed April 23, 1903.

[SEAL.]

J. M. WYMAN,
Clerk of the District Court.

13 In the District Court, Reno County, Kansas.

GEO. C. RANKIN, Plaintiff,
vs.
E. E. BARTON, Defendant. } No. 8930.

STATE OF KANSAS,
Ninth Judicial District, Reno County, } *ss:*

I, J. M. Wyman, clerk of the district court of the ninth judicial district of the State of Kansas, sitting within and for the county aforesaid, do hereby certify that the above and foregoing is a true,

full and complete transcript of the record in the above entitled cause in the therein entitled cause, as the same remains on file and of record in my office.

Witness my hand, and the seal of said court affixed at [SEAL.] my office in Hutchinson, this the 26" day of May, A. D. 1903.

J. M. WYMAN,
Clerk of District Court of Reno County,
By AMY J. ALEXANDER, Deputy.

Filed Jul- 20 1903

D. A. VALENTINE,
Clerk Supreme Court.

14 Be it further remembered, that on the 5th day of May, 1904, the same being one of the regular judicial days of the January 1904 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record to-wit:—

15 Journal Entry of Submission.

GEORGE C. RANKIN, Receiver, etc., Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error.
} No. 13691.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Reno county: and thereupon said cause is submitted on brief of counsel of both parties and taken under advisement by the court.

16 Be it further remembered, that afterward and on the 7th day of July, 1904, the same being one of the regular judicial days of the July 1904 term of the supreme court the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record to-wit:—

17 Journal Entry of Judgment.

GEORGE C. RANKIN, Receiver, etc., Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error.
} No. 13691.

This couse comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the plaintiff in error pay the costs of this case in this court taxed at $— and hereof let execution issue.

18 And also on the 7th day of July, 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, the syllabus and opinion of said court in this cause which syllabus and opinion are in words and figures as follows to-wit:—

19 GEORGE C. RANKIN, Receiver, v. EDWARD E. BARTON. } No. 13691. Error from Reno County. Affirmed.

Syllabus—By the Court—Johnston, C. J.

1. An action to enforce the individual liability of a stockholder in a national bank is governed by the statute of limitations of the State in which the action is brought.
2. Ordinarily a cause of action on such liability does not accrue until the Comptroller of the Currency orders an assessment upon the stockholder, but that officer is subject to the rule that where preliminary action is essential to the bringing of a suit upon a claim, and such precedent action devolves upon the claimant, he cannot prevent the operation of the statute of limitations by unnecessary delay in taking such action.
3. Where a national bank becomes insolvent it is the duty of the Comptroller to make an accounting and determine the necessity for assessments upon stockholders, and, if any, the extent of the same, within a reasonable time, and if he fails to do so within that time the statute of limitations will then begin to run in favor of stockholders.
4. Where the facts alleged in his pleading disclose that an assessment against stockholders was not made within a reasonable time, the admission is not overcome by an averment that he did exercise diligence and made a second assessment as soon as he ascertained that the first assessment and the assets of the bank were insufficient.

All the justices concurring.

A true copy.
Attest:—

——— ———,
Clerk Supreme Court.

20 GEORGE C. RANKIN, Receiver, v. EDWARD E. BARTON. } No. 13691. Error from Reno County. Affirmed.

The opinion of the court was delivered by JOHNSTON, C. J.:

This was an action to enforce the individual liability of a stockholder in a national bank. In his petition George C. Rankin alleged that he was the receiver of the Hutchinson national bank, which became insolvent in 1893; that after an accounting, and on July 19, 1894, the Comptroller of the Currency found it necessary and ordered an assessment of $75,000 upon the individual liability of the stock-

holders, being $75 on each share of stock, to pay the debts of the bank. It was further averred that after the application of the amounts collected on this assessment, and after a further accounting, it was found necessary to make, and the Comptroller, on November 20, 1900, did make, a further assessment of $19,000, being $19 upon each share of stock, and "that said assessment was made just as soon as discovered in the exercise of diligence to be necessary, and just as soon as it was ascertained that the first assessment and the assets of the bank were insufficient." It was alleged that the defendant owned thirty-three shares of stock and that his contribution under the second assessment was $627, which he had failed to pay and for which judgment was asked. This action was commenced on November 13, 1902. The defendant demurred to the petition because it did not contain sufficient facts to constitute a cause of action and showed upon its face that the plaintiff's action was barred by the statute of limitations. The demurrer was sustained by the trial court, and the question argued here is whether the second attempt to enforce the individual liability of stockholders, made more than nine years after the insolvency of the bank, was in time to escape the bar of the statute of limitations.

Under the national bank act, shareholders of a bank are made individually responsible for the debts of the bank to the extent of the par value of their stock in addition to the amount which
21 they have invested in such stock. In case of the insolvency and liquidation of a national bank the Comptroller of the Currency is vested with authority to appoint a receiver, to make an accounting, and, if necessary, enforce the double liability of stockholders. Whether a resort to this personal liability is necessary, and to what extent, is for him to determine. This was specifically determined in Kennedy *v.* Gibson, 8 Wall. 498, where it was said:

"It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver."

It is contended that there is no enforcible liability until the Comptroller exercises his judgment and discretion and makes an assessment, and that his act in ordering an assessment being indispensable as a precedent to the commencement of an action to enforce payment, the time limited for the commencement of an action did not begin to run until the assessment had been made. Although the cause of action arose under an act of Congress, that body prescribed no limitation on the remedy against stockholders, and hence

the statutory limitation of the State in which the action was brought necessarily applies. This was decided by the Supreme Court of the United States, in Campbell *v.* Haverhill, 155 U. S. 610, in an action for the infringement of a patent, where it was remarked that "the truth is that statutes of limitations affect the remedy only and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States." See, also, McElmoyle *v.* Cohen, 13 Pet. 312; Andreae *v.* Redfield, 98 U. S. 225; Barney *v.* Oelrichs, 138 U. S. 529; Bauserman *v.* Blunt, 147 U. S. 647. As a remedy and the time of its enforcement is governed by the local law, the next inquiry is, When did the cause of action accrue? The stockholder's liability was assumed when the contract of subscription was made, but it was not enforcible, and the right of action thereon did not arise, until action was taken by the
22 Comptroller. How long may action be postponed by that officer without sacrificing the remedy? Whatever the rule may be in other States, it is well settled in Kansas that essential steps preliminary to the bringing of an action must be taken within a reasonable time, and if not then taken the statute of limitations will begin to run (Railroad Co. *v.* Burlingame Township, 36 Kan. 628; Rork *v.* Commissioners of Douglas County, 46 Kan. 175; Bauserman *v.* Charlotte, 46 Kan. 480; Kulp *v.* Kulp, 51 Kan. 341; Commissioners of Graham County *v.* Van Slyck, 52 Kan. 622; Harrison *v.* Benefit Society, 59 Kan. 29; Bank *v.* King, 60 Kan. 733; Black *v.* Elliott, 63 Kan. 211; Bank *v.* West, 66 Kan. 524; Bauserman *v.* Blunt, 147 U. S. 647). The condition of the bank, the preservation of the assets and the adjustment of claims and payments of creditors, all enjoined prompt action on the part of the Comptroller. West *v.* Bank, *supra*, was an action to enforce a stockholder's liability. Payments on subscriptions to bank stock were to be made at intervals on the call of the directors. The bank became insolvent and no call or demand for payments on subscription was made for some time, and it was held that the statute of limitations began to run, notwithstanding the omission to make the call. In speaking of the diligence necessary in such a case, Justice Burch remarked that "Being insolvent, the duty of the corporation to satisfy its obligations became urgent and imperative. As creditor it had the power to fix at once its debtor's liability. Delay for a single day was inexcusable and the statute commenced to run at once." And farther along in the opinion it was said that "The principle of A. T. & S. F. R. R. Co. *v.* Burlingame Township, *supra*, is now so thoroughly engrained in the fabric of our jurisprudence that it is not sufficient in this State to say with the authorities just cited, that the statute does not commence to run until the unconditional liability is fastened upon the subscriber by a call or its equivalent. Since the corporation can fix the liability and thereby start the statute, delay in doing so cannot prevent its running. To hold otherwise

and permit the liability of the stockholder to continue for an indefinite period would defeat the policy underlying the statute."

23 Of course, the Comptroller is not required to make an assessment until he has had time to ascertain the condition of the bank by summing up the claims of creditors and appraising its assets. But nothing in the duties imposed upon that officer makes a long delay necessary to determine the necessity for an assessment or the extent of it. One assessment does not necessarily exhaust his power to make another, providing it is done within the time such liabilities may be enforced. In referring to the promptitude necessary in such cases, Justice Swayne, of the Supreme Court of the United States, in Kennedy *v.* Gibson, *supra*, said that "A speedy adjustment is necessary to the efficiency and utility of the law. The interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better that there should be more than may prove to be needed than that the evils of delay should be encountered." The present action was brought nine years after the insolvency of the bank and more than eight years after the first assessment had been made. The averment by plaintiff that he was diligent in the matter is no more than a conclusion, and does not overcome the effect of the allegations showing unreasonable delay and manifest negligence. It is not always easy to determine what is a reasonable time within which such action should be taken, but it does appear beyond dispute that the Comptroller made an accounting and ascertained the condition of the bank eight years before the present action was brought. About a year elapsed between the insolvency and the first assessment, and that appears to have been a reasonable time within which the prerequisite steps towards fixing the liability of stockholders should have been taken. An accounting was in fact had and on that the necessity was determined and the order was made. It may be said that the action of the Comptroller in not making a full assessment in the first instance was out of consideration for the stockholders, and in order that he might not collect more than was necessary; but as was said in Kinnedy

24 *v.* Gibson, *supra*, if too much is collected and a surplus remains after satisfying the demands against the bank, it may be repaid to the stockholders. "It is better that there should be more than may prove to be needed than that the evils of delay should be encountered."

Attention is called to the case of Aldrich *v.* Skinner, 98 Fed. 375, in which it is held that the time limited for the commencement of such an action as this cannot begin to run until the assessment has been ordered. The court in that case, however, gave no consideration to the question presented in this, and that is, whether the delay of the Comptroller to take the prerequisite steps within a reasonable time would start the running of the statute. The court recognized

that an action to enforce such liability is governed by the rule of the State in which the action is brought, and if the question had been presented would undoubtedly have followed the Supreme Court of the United States, in Bauserman *v.* Blunt, *supra*, in holding that the prevailing rule in a State requiring a party to take the preliminary steps necessary to the bringing of a suit within a reasonable time, and if he does not that the statute will begin to run within a reasonable time after he could have taken the steps and perfected his right. This was the view taken by the United States circuit court, in Price *v.* Yates, 2 Nat'l Bank Cases, (Brown), 204, 19 Federal Cases, p. 1322.

The individual liability of stockholders being one created by statute the period of limitation on the right to enforce it under our code is three years, and as more than double that time has elapsed the action was barred and the demurrer was, therefore, rightly sustained.

Judgment affirmed.

All the justices concurring.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

25 And afterwards, on the 26th day of July, 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a rehearing of this cause, which petition for a rehearing is in words and figures as follows to-wit:—

26 In the Supreme Court of the State of Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error. } No. 13691.

Petition for Rehearing.

Comes now the plaintiff in error, George C. Rankin, receiver, by his attorney, H. Whiteside, within the time limited by the rules of this court, and petitions the court for a re-hearing of the above entitled case, upon the following grounds:

1. That the principal and controlling feature in the case, which was duly submitted by counsel for plaintiff in error, has been overlooked by the court, and

2. That the decision of this court is in conflict with a controlling decision in a case parallel to the one at issue, to wit, the case of Aldrich *v.* Skinner, in the 98 Federal Reporter, which case was cited by plaintiff in error in his brief, and which appears to have been overlooked by this court in rendering its decision.

Argument.

It seems that, in considering the issues of this case, the court lost sight of the fact that the facts, as set forth in the amended petition of plaintiff, are all admitted by defendant in error and that the allegation of plaintiff, *i. e.*, "that said assessment was made just as soon as discovered, in the exercise of diligence, to be necessary, and just as soon as it was ascertained the first assessment and the assets of the bank were insufficient" is therefore controlling upon the defendant in error and this court, as well.

27 It is conceded that the Comptroller of the Currency is vested with a wide discretion in the exercise of his duties, as is borne out by a wealth of reason and sum total of authorities, and, in view of this fact and in view of the further fact, which stands admitted by counsel for defendant in error, that the Comptroller of the Currency and likewise the plaintiff in error, who acted under him, used all due diligence in laying the preliminary steps for this action, your petitioner would respectfully contend that the plaintiff in error is wholly within the law and that the apparent running of the statute of limitations has not done so, in fact, and, therefore, is not a bar to this action.

This contention is borne out upon two grounds, first, that the cases cited by defendant in error do not pointedly deal with or decide this question as to the effectiveness of the State statute of limitations as against the diligent action of the Comptroller of the Currency, and for the further reason that the case of Aldrich *v.* Skinner, in the 98 Federal Reporter, which was cited by counsel for plaintiff in error and overlooked, apparently, by this court, is directly analogous to the case at bar and decides in no uncertain terms that the Comptroller of the Currency must be and is vested with a wide discretion and that he is not to be hampered by local statutes of limitation.

I desire to call the court's attention again to the language of this case, wherein the court says:

"A cause of action cannot be said to have accrued until it exists as a complete right which some person, as the owner of such right, or as the representative of others, may enforce immediately by going into court and filing the necessary papers, upon which process may issue to bring the adverse party within the jurisdiction of the court. It is not true that the statutory liability of shareholders of national bank associations becomes absolute in all cases immediately upon the suspension of the bank. A bank may suspend payment because it has no money on hand to meet the demands of its creditors, nor ability to immediately convert other assets into money, and yet, if when an accounting is had there is found to be an abundance of assets which may within a reasonable time be converted into money, so that all the bank's indebtedness may be paid without an assessment upon shareholders, it would be wrong and unlawful to assess them. If, however, after such an accounting with such a result and

before payment of the bank's indebtedness valuable security should be lost, destroyed or shrink in value, so that the debts could not be paid in full without assessing the shareholders, such a change in the condition would render an assessment necessary. Considering the nature of the liability and the purpose of the statute in creating it, it is obvious that it is essential to the right of the receiver of an insolvent national bank to sue the shareholders for assessments, *that*
28 *the necessity for an assessment should first be ascertained by an accounting and appraisement of the* of the *assets and the question as to the necessity for an assessment determined by competent authority. The law vests the authority in the Comptroller of the Currency and until he orders an assessment the receiver of an insolvent nationa' bank can not take the first step toward compelling shareholders to pay assessments.* * * * The act of the Comptroller in ordering assessments, *being indispensable* as a precedent to the commencement of an action to enforce payment *the time limited for the commencement of such an action can not commence to run until the assessment has been ordered."*

It would seem that all reason should be in accord with this authority. The plaintiff in error was absolutely unable, because unauthorized, to institute this action within the time in which, by contention of defendant in error and by decision of this court, he would have been required to do so; and since, by express statute and by unanimous decisions, the Comptroller of the Currency is vested with the discretion which is admitted and since it is admitted by defendant in error that he acted with all due diligence and made the assessment upon which this action is based as soon as it was determined to be necessary and in view of the fact that this action is sustained by the logical reasoning of the above case and in view of the further fact that the plaintiff in error instituted this action within a short time and within the statutory limit after the assessment had been made by the Comptroller (up until which time he was unable to institute any action), the plaintiff in error believes that this honorable body should not have affirmed the decision of the lower court and hereby respectfully petitions this court for a re-hearing of the above entitled case.

H. WHITESIDE,
Attorney for Plaintiff in Error.

(Endorsed :) No. 13,691 Rankin *v.* Barton Petition for rehearing. Filed July 26, 1904. D. A. Valentine, clerk supreme court.

29 Be it further remembered, that afterwards on the 3rd day of October, 1904, the same being one of the regular judicial days of the July, 1904 term of the supreme court of the State of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding was had and remains of record to-wit:—

30 Journal Entry Denying Petition for Rehearing.

GEORGE C. RANKIN, Receiver, etc., Plaintiff in Error,
vs.
E. E. BARTON, Defendant in Error. } No. 13691.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition be denied.

31 And afterwards on the 25th day of October, 1904 there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a writ of error, with an assignment of errors attached thereto, which petition for a writ of error together with the assignment of errors attached thereto are in words and figures as follows to-wit:—

32 Filed Oct. 25, 1904. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

GEORGE C. RANKIN, Receiver, Plaintiff in Error,
vs.
E. E. BARTON, Defendant in Error.

Error from Reno County.

Petition for Writ of Error.

George C. Rankin a citizen of the United States and resident of the city of Washington D. C. and who brought and maintained suit in this cause as receiver of the Hutchinson national bank organized under the laws of the United States, to which office he was appointed and now holds by authority of the Comptroller of Currency of the United States and under the laws of the United States as appellant in the above cause, wherein was drawn in question the proper validity and proper construction of the national banking act of the United States, and to what extent the provisions thereof should be controlled and governed by the laws and decisions of the State of Kansas in the limitatio- of actions, feeling himself aggrieved by the decision and judgment entered in the above cause and court on the 7 day of July 1904, wherein the court affirmed the sustaining of a demurrer to the petition in which he stated his cause of action, and refused to vacate the judgment and proceeding by it reviewed of the proceedings in error from the district court of Reno county, Kansas, on the ground: That in the matter of limiting time in which appellant as receiver under the national banking acts aforesaid can sue delinquent stockholders he was governed and the time was fixed by

laws and decisions of the State of Kansas, and not by said Federal law, and also by the said court denying his petition to rehear on Oct. 1, 1904, comes now by H. Whiteside his attorney and prays an order allowing plaintiff in error to prosecute the writ of error to the honorable Supreme Court of the United States under and according to the laws of the United States, in that behalf made and provided, there being in said judgment and proceeding certain errors committed to the prejudice of your petitioner as will more fully and in detail appear from an assignment of errors filed herewith.

33 Appellant also prays that an order be made fixing the security which he should give in this proceeding and the time in which he should give it and that when it is given all further proceeding in this court be stayed until the determination of said writ of error by the Supreme Court of the United States, and your petitioner will ever pray.

H. WHITESIDE,
Attorney for Appellant and Petitioner.

Oct. 24, 1904.

Let the writ of error prayed for be allowed.

W. A. JOHNSTON,
Chief Justice of the State of Ks.

Bond with security or a cash deposit in lieu to supersede & stay judgment to be filed or made in 15 days in the sum of $200.00.

W. A. JOHNSTON,
Chief Justice of the State of Ks.

34 Filed Oct. 25, 1904. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the United States, —— Term, in the Year of Our Lord 1904.

GEORGE C. RANKIN, Receiver, Plaintiff in Error,
vs.
E. E. BARTON, Defendant in Error.

Assignment of Errors.

Comes now George C. Rankin plaintiff in error, who was plaintiff in the case below, and alleges and shows to the court that in regard to any proceedings had in the above cause there is manifest error to his prejudice in the following particulars, to-wit:

First. That the supreme court of the State of Kansas erred in affirming the judgment against the plaintiff in error and the proceedings of the district court of Reno county, Kansas, shown by the record to have been presented to it for review in said cause.

Second. That the supreme court of Kansas erred in affirming the order and decision of the district court of Reno county in sustaining the demurrer filed by the defendant in error to the petition primarily filed by the plaintiff in error in which he stated his cause of action which said demurrer is shown by the record to have been reviewed by said supreme court of Kansas.

Third. That said supreme court of Kansas erred in holding that in an action to enforce the individual liabilities of a stockholder in a national bank a receiver is governed by the statute of limitation to the State in which the action is brought and not governed by the national banking act, and erred in its construction of the said banking act.

4th. That the supreme court of Kansas erred in holding that the Comptroller of Currency had not made an accounting and determined the necessity for assignment upon the stockholders in this particular cause within a reasonable time; and also erred in holding that the statute of limitations ran in favor of the stockholders.

35 5th. That the supreme court of Kansas erred in holding that the plaintiff had not brought his suit within a reasonable time and that assessments mentioned therein were not made in a reasonable time and also in holding that the Comptroller of Currency and plaintiff did not exercise due diligence in suing the stockholder upon individual liability.

Wherefore, George C. Rankin receiver and plaintiff in error, prays that the order and judgment and decision of the said supreme court of Kansas be reversed and that such directions be given that plaintiff in error be restored to all the things which he has lost by reason of said judgment and decision *said* herein to be reversed, and for cost of this proceeding.

H. WHITESIDE,
Attorney for Appellant and Petitioner.

36 [Endorsed:] 13691. George C. Rankin, receiver, *v.* Edward E. Barton. Assignment of errors & pet. Filed Oct. 25
1904 D. A. Valentine, clerk supreme court.

37 Be it further remembered, that on the 25th day of October, 1904 the same being one of the regular judicial days of the July 1904 term of the supreme court of the State of Kansas, before Honorable William A. Johnston, chief justice of the supreme court of the State of Kansas at his chambers in the city of Topeka, the following proceeding was had and remains of record to wit:—

38 Journal Entry of Stay.

GEORGE C. RANKIN, Receiver, etc., Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error. } No. 13691.

Now comes the plaintiff in error by H. Whiteside, his attorney, and presents his petition for leave to prosecute a writ of error to the honorable Supreme Court of the United States; and also presents his application for an order of this court fixing the amount of a supersedeas bond and the time within which said bond shall be given for the staying of all further proceedings in this court and the district court of Reno county herein, until the final determination of the said writ of error by the Supreme Court of the United States. And thereupon after due consideration it is ordered that the petition for leave to prosecute a writ of error to the Supreme Court of the United States be allowed; it is further ordered that the application for a stay of the execution of the judgment of this court and the district court of Reno county and all proceedings thereunder be allowed and that the judgment of this court be superseded and all proceedings thereunder be and are hereby stayed, upon the plaintiff in error giving to the defendant in error, within fifteen days from this date, a good and sufficient supersedeas bond in the sum of $200.00 conditioned that the plaintiff in error will pay to the defendant in error all damages which he may sustain by reason of the making of this order of stay if the judgment of this court be affirmed in whole or in part.

39 And also on the 25th day of October, 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error, which with the allowance thereof and the endorsements thereon is in words and figures to-wit:—

40 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the supreme court of the State of Kansas:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of Kansas, before you, at the July session of the July term, 1904, thereof, between George C. Rankin receiver, plaintiff-in-error, *versus* Edward E. Barton, defendant-in-error, a manifest error has happened to the great damage of the said George C. Rankin, receiver, plaintiff-in-error, as by his complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of the clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid be- inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this October 25th, 1904.

Done in the city of Topeka, with the seal of the circuit court of the United States for the district of Kansas, attached.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk Circuit Court of the United States,
District of Kansas.

Allowed October 24th, 1904.
W. A. JOHNSTON,
Chief Justice of the Supreme Court
of the State of Kansas.

41 [Endorsed:] 13691 George C. Rankin rec. *v.* Edward E. Barton Writ of error Filed Oct. 25 1904 D. A. Valentine clerk supreme court.

42 And afterwards on the 27th day of October, 1904, there was filed in the office of the clerk of the supreme court of the State of Kansas, a citation together with an acknowledgement of the service of the same, which, with the endorsements thereon is in words and figures as follows, to-wit:—

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to E. E. Barton, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days after the date herein, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, wherein J. C. Rankin receiver, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment granted should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the chief justice of the supreme court of the State of Kansas this 25 day of October, 1904.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of
the State of Kansas.

Attest:
D. A. VALENTINE, Clerk,
By H. L. ARMSTRONG, Deputy.

Service of the above and foregoing citation on the 26 day of Oct. 1904 is hereby acknowledged by the undersigned att'ys in fact and of record for E. E. Barton def't in error.

VANDEVEER & MARTIN, Att'ys.

44 [Endorsed:] 13691 George C. Rankin receiver pl'ff in er. *v.* Edward E. Barton, def't in error Citation Filed Oct. 27 1904 D. A. Valentine clerk supreme court. H. Whiteside attorney.

45 In the Supreme Court of the State of Kansas.

GEORGE C. RANKIN, Receiver, etc., Plaintiff in Error,
vs.
EDWARD E. BARTON, Defendant in Error. } No. 13691.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above entitled cause, as the same now remain on file and of record in my office.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 18th day of November, A. D. 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

46 UNITED STATES OF AMERICA, } *ss*:
Supreme Court of Kansas, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said supreme court, in the city of Topeka, this 18th day of November, A. D., 1904.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 19,539. Kansas supreme court. Term No. 125. George C. Rankin, receiver of the Hutchinson national bank, plaintiff in error, *vs.* Edward E. Barton. Filed November 25th, 1904. File No. 19,539.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 13 1905
JAMES H. MCKENNEY,
Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GEORGE C. RANKIN, Receiver,
Plaintiff in Error.

vs.

EDWARD E. BARTON,
Defendant in Error.

No. 125.

Brief and Argument for Plaintiff in Error.

H. WHITESIDE,
Attorney for Plaintiff in Error.

THE NEWS CO., PRINTERS, HUTCHINSON, KANSAS. 1905.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GEORGE C. RANKIN, Receiver,
Plaintiff in Error.

vs.

No.

EDWARD E. BARTON,
Defendant in Error.

Brief and Argument for Plaintiff in Error.

STATEMENT.

On November 13, 1902, plaintiff filed his amended petition in the district court of Reno county, Kansas, against defendant, the same being in words and figures as follows:

"Plaintiff, George C. Rankin, avers that he is the duly elected and qualified receiver of The Hutchin-

son National Bank, a corporation, organized under the laws of the United States, and which once did business at Hutchinson, Kansas; that said banking association became insolvent in 1893 and its assets passed into the hands of the receiver for distribution among its creditors, with the balance, if any, to go to the stockholders; that on July 19, 1894; after an accounting by the receiver with the comptroller of the currency of the United States, it was found necessary by said comptroller, in order to pay the just debts of said association, to make an assessment of ($75,000) seventy-five thousand dollars upon the individual liability of the stockholders of said bank and enforce the said liability to said extent, being seventy-five dollars ($75.00) on each share of stock held.

"Your petitioner further avers that after the application of the amounts collected upon individual liability, by reason of said assessment, and from any remaining assets of said bank, it was found, after further accounting by the receiver with the comptroller of the currency, that it was and would be necessary, in order to pay the just debts of said bank remaining unpaid, to further enforce the individual liability of the stockholders to the extent of nineteen thousand dollars ($19,000), or nineteen dollars ($19.00) upon each share of stock held or owned by said stockholders; and duly advised in the premises, on November 20, 1900, the comptroller of the currency did make said assessment and requisition and did then and there demand of the stockholders nineteen

dollars ($19.00) upon each share of stock by them held or owned in said bank. That said assessment was made just as soon as discovered in the exercise of diligence to be necessary and just as soon as it was ascertained the first assessment and the assets of the bank were insufficient.

"Your petitioner further avers that the defendant, Edward E. Barton, held and owned thirty-three (33) shares of stock in said bank, of the par value of thirty-three hundred dollars ($3,300.00), and his individual contribution necessary to pay the debts of said association and satisfy the said assessment last above mentioned, as a stockholder, was six hundred twenty-seven dollars ($627.00), and that his liability is now said sum, with interest from November 20, 1900.

"Plaintiff avers that, duly authorized and directed by said comptroller to enforce said assessment and liability, by suit or otherwise, he has repeatedly since November 20, 1900, made a demand on defendant for said sum, with interest, but the said defendant has neglected and refused to pay the sum, or any part thereof.

"Wherefore, plaintiff prays judgment against defendant for the sum of six hundred twenty-seven dollars ($627.00), with interest at six (6) per cent. from November 20, 1900, and costs of suit, also prays judgment for general relief."

To this petition defendant filed a demurrer, in words and figures as follows:

"Comes now the defendant, Edward E. Barton, by his attorneys, Vandeveer & Martin, and demurs to plaintiff's amended petition, for the reason that said amended petition does not state facts sufficient to constitute a cause of action. Defendant further demurs to said amended petition, for the reason that said amended petition shows upon its face that the plaintiff's cause of action is barred by the statute of limitations."

On the —— day of ————————, 1903, the said demurrer came on for argument; and the court sustained it, upon both grounds, and rendered a judgment against plaintiff for dismissal and costs of suit. Exceptions to the ruling and judgment of the court were taken by the plaintiff and a transcript of the record attached to a petition in error and filed in the supreme court of Kansas, which sustained the judgment and ruling of the trial court, and a review is sought by proceeding in error in this cause.

I have not the petition in error and transcript before me and hence can not refer to pages of the record, but, as it is so short and simple, this can result in no inconvenience to the court.

It will be noted that the petition alleges that the last assessment made by the comptroller upon the individual liability of stockholders was made after an accounting with the receiver and a determination that it would be necessary to make the additional assessment, in order to pay the just debts of the bank unpaid, and that this assessment was made just as soon as it was discovered, in the exercise of dili-

gence, to be necessary and just as soon as it was ascertained the first assessment and the assets of the bank were insufficient.

I ask the court to carefully read the amended petition demurred to, for it strikes my mind that it was very well drawn and states a good cause of action, and that the state courts erred in their construction of the National Banking Act, and in their application of the statute of limitations.

ARGUMENT.

The Supreme Court of the United States has repeatedly decided that, under sections 5151, 5234 and 5236 of the Revised Statutes of the United States, it is for the comptroller to decide whenever it is necessary to institute proceedings against the stockholders, to enforce their personal liability, and whether the whole or a part and if only a part, how much, shall be collected and how many assessments shall be made. These questions are referred to his judgment and discretion and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make and order the enforcement of the assessment at such time as he may deem proper and upon such data as shall be satisfactory to him. He may order as many assessments as are necessary to pay the debts of the corporation, up to the limit of the stockholder's liability. The exercise of his judgment and authority is indispensable whenever

the personal liability of the stockholder is sought to be enforced and it must precede the institution of the suit by the receiver.

I call attention to

Kennedy v. Gibson, 8 Wall, 498.
Casey v. Galli, 94 U. S. 673.
U. S. v. Knox, 102 U. S. 422.
Germanica National Bank v. Case, 131 U. S. Appendix, 144.
Bushnell v. Leland, 164 U. S. 684.
Aldrich v. Yates, 95 Fed. Rep. 78.
Aldrich v. Campbell, 97 Fed. Rep. 663.
Deweese v. Smith, 97 Fed. Rep. 309.
Studebaker v. Perry, 102 Fed. Rep. 947.
Studebaker v. Perry, ——— U. S. ———.

Under the allegations of the petition, on July 19, 1894, after an accounting with the receiver, who was but the instrument of the comptroller, the said comptroller of the currency found that it was necessary to make an assessment of seventy-five (75) per cent. upon the individual liability of the stockholders of said bank and to enforce the individual liability of the stockholders to that extent. After the application of the amounts collected from this individual liability, by reason of said assessment, and from any remaining assets of said bank, it was found, after further accounting by the receiver with the comptroller of the currency, that it would be necessary, in order to pay the just debts of said bank remaining unpaid, to further enforce the individual liability of the stockholders to the extent of nineteen (19) per cent of their subscriptions; and that, duly advised in the premises, on the 20th of

November, 1900, the comptroller of the currency did make said assessment and requisition, and did demand the payment of said assessment of the stockholders. It is further specifically alleged that this assessment was made just as soon as discovered, in the exercise of due diligence, to be necessary and just as soon as it was ascertained that the first assessment and the assets of the bank were insufficient.

It will be noted that the petition was filed on the 13th day of November, 1902, a little less than two years from the date of the assessment, and the demand upon the stockholders for the said nineteen (19) per cent.

The ground upon which the court sustained the demurrer to the petition was that it showed *upon its face* the cause of action was barred by the statute of limitations; and the defendant depended upon the case of *Fox vs. Bank, in the 9 Kansas Appeals*, at page 18, and the cases therein cited, also upon the case of *Price, Receiver, v. Yates, 2nd Brown's National Bank Cases, page 204.*

The question is, was the court right in holding that the cause of action as stated was barred by the statute of limitations? I insist that the cases referred to as authorities by the defendant are not applicable, under the petition in this case, for the reason that the petition alleges the assessment was made just as soon as the comptroller of the currency found it to be necessary and just as soon as it was ascertained that the assets of the bank and those

derived from the first assessment were insuffiient to pay the debts of the corporation. The preliminary steps could not have been taken by the comptroller of the currency, under the allegations of this petition, any sooner, because he has no right to make an assessment, in the first place, until it is necessary, and he has no right to make a second or third assessment unless it develops that it is necessary, to pay the just debts of the corporation. Under the Federal decisions which I have already cited, it is not his duty to order an entire assessment in advance of the necessity, simply because it might possibly happen that the assets would not pay out as expected. He is clothed not only with discretion; but with authority to exercise his judgment and if he does this with diligence, the step is valid and binding upon the stockholders, although it may have been more than three years since the insolvency of the bank or since a prior assessment.

Now, it may be admitted that, as a general rule, the ordinary statute of limitations in the jurisdiction where the suit is brought would not run before the comptroller of the currency, in due diligence, would discover that it was necessary to make an additional assessment; but it is not impossible for so much litigation and delay to take place in the winding up of the affairs of a bank, particularly a bank with one hundred thousand dollars of capital stock, that the comptroller of the currency could not determine in that time whether or not it is necessary to make the additional assessment. The stockholder is not

prejudiced, the comptroller of the currency is acting for his best interest, as well as the best interests of the creditors.

The state of facts presented by the petition in this case is entirely different from the state of facts presented in the cases cited by the defendant at the trial, and to which I have referred; and I venture to assert that the same will be true as to any additional cases he may cite. Besides, the reasonable construction which I place upon the application of the statute of limitations in a case like this, should not be turned down by a few extreme cases. It should be not forgotten that the demurrer admits the truth of all the facts stated in the petition.

I could add nothing as to the object of the federal law, in clothing the comptroller of the currency with such authority and discretion in ordering assessments upon individual liability, to what is stated in the various cases which I have referred to, decided by the Supreme Court of the United States. The cases of *Kennedy v. Gibson*, *Studebaker v. Perry*, *Supra*, are full and explicit.

As to whether the administration of the treasury department of the United States is to be hampered by inconvenient and restrictive constructions of local laws, I need not address myself, for, under my view, the action was brought more than one year before the statute of limitations ran against it. (See section 4446 General Statutes of Kansas 1901, 2nd Sub. Div.) My opinion is that the federal courts, however, would disregard this local law or its local construction, whenever

in their judgment it would unreasonably restrict the federal government.

In the case of *Aldrich v. Skinner*, *98 Fed. Rep.*, I find a case which, in my judgment, is a reasonable authority for the construction I insist upon. The following language is used on page 377:

"The defendant contends that the law became certain and the cause of action accrued at the time of suspension of the bank, or if not then, at the time when the receiver qualified and took charge of the assets and business of the bank. This decision appears to be untenable. A cause of action can not be said to have accrued until it exists as a complete right which some person as the owner of such right or as the representative of others, may enforce immediately by going into court and filing the necessary papers, upon which process may issue to bring the adverse party within the jurisdiction of the court. It is not true that the statutory liability of shareholders of national bank associations becomes absolute in all cases immediately upon the suspension of the bank. A bank may suspend payment because it has no money on hand to meet the demands of its creditors, nor ability to immediately convert other assets into money, and yet, if when an accounting is had there is found to be an abundance of assets which may within a reasonable time be converted into money so that all the bank's indebtedness may be paid without an assessment upon shareholders, it would be wrong and unlawful to assess them. If, however, after such an accounting with such a result and before payment of the bank's indebtedness valuable security should be lost, destroyed or shrink in value, so that the debts could not be paid in full without assessing shareholders, such a change in the condition would render an assessment necessary. Considering the nature of the liability and the purpose of the statute in creating it, it is obvious that it is essential to the right of a receiver of an insolvent national bank to sue the shareholders for assessments, that the necessity for

an assessment should first be ascertained by an accounting and appraisement of the assets and the question as to the necessity for an assessment determined by competent authority. The law vests the authority in the comptroller of the currency and until he orders an assessment the receiver of an insolvent national bank can not take the first step towards compelling shareholders to pay assessments. * * * The act of the comptroller, in ordering an assessment, being indispensable, as a precedent to the commencement of an action to enforce payment, the time limited for the commencement of such an action can not commence to run until the assessment has been ordered.''

The reasoning in this case is in accord with the unquestionable objects of the federal law and with the federal decisions and ought to be followed in all states, at least when it is alleged in the petition, that the comptroller of the currency made the assessment just as soon as he found it was necessary to do so and just as soon as that fact in diligence could be determined while winding up the insolvent bank.

Respectfully.

H. WHITESIDE,

Attorney for Plaintiff in Error.

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SEP 8 1905

IN THE

SUPREME COURT

OF THE

UNITED STATES

GEORGE C. BARTON, Receiver,
Plaintiff in Error,
v.
EDWARD E. BARTON,
Defendant in Error.

Oct. Term 1905
No. 245

Brief and Argument for Defendant in Error.

F. L. MARTIN,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

GEORGE C. RANKIN, Receiver,
Plaintiff in Error,
V.
EDWARD E. BARTON,
Defendant in Error.

No._____

Brief and Argument for Defendant in Error.

This case comes to this court upon a writ of error to the Supreme Court of the State of Kansas. The action was brought in the District Court of Reno County, Kansas, by the plaintiff in error as plaintiff below against the defendant in error, as defendant below, upon an assessment

ordered by the Comptroller of the Currency against the defendant as a former stock holder in the Hutchinson National Bank. An amended petition was filed, to which the defendant demurred. The demurrer was sustained upon the ground that the action was barred by the statute of limitations. Plaintiff took the case on proceeding in error to the Supreme Court of Kansas, where the judgment of the District Court was affirmed.

As shown by the amended petition, to which the demurrer was sustained, the bank became insolvent in 1893 and its assets then passed into the hands of a receiver; on July 19, 1894, after an accounting by the receiver with the Comptroller of the Currency, an assessment of $75,000.00 was ordered against the stock holders. No further action was taken by the Comptroller until the 20th day of November, 1900, more than seven years after the bank first passed into the hands of a receiver and more than six years after the first assessment was made, when a second assessment was ordered by the Comptroller and it is to collect this second assessment that this action was brought against the defendant.

ARGUMENT.

We present two questions:

1. Was the plaintiff's action barred by the statute of limitations?

2. Has this court jurisdiction to review the decision of the Supreme Court of the State?

Perhaps it would be more logical to reverse the order of these propositions and first discuss the question of jurisdiction, but to do so would necessitate much repetition as the latter necessarily involves the former.

I.

Was the Plaintiff's Action Barred by the Statute of Limitations?

There is no Federal statute of limitations applicable to this class of actions and the statute of limitations of the state in which the action is brought controls.

Campbell vs. Haverhill, 155 U. S., 610.

Price vs. Yates, 2 National Bank cases (Brown), 204.

Answering the suggestion of counsel for plaintiff in error, that the treasury department (the Comptroller of the Currency) ought not to be hampered by inconvenient and restrictive local laws, we need only suggest that if Congress be not satisfied with the limitations prescribed by local statutes in such cases, it is in the power of that body to enact a Federal Statute which shall govern. Until such a Federal Statute shall have been passed the local state statutes must apply.

Different courts have taken opposite views as regards the nature of liability in such cases, some holding that the liability is contractual, while others insist that the liability is one created by statute. It is not important, however, for us to discuss this question since in either case the action would be barred by the Kansas Statute.

Section 18 of the Code of Civil Procedure, being General Section 4446 of the General Statutes of Kansas, 1901, provides:

"Section 18. Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued and not afterwards:

First, Within five years: An action upon any agreement, contract or promise in writing.

Second, Within three years: An action upon a liability created by a statute other than a forfeiture or penalty.

Sixth, An action for a relief not hereinbefore provided for can only be brought within five years after the cause of action shall have accrued."

A statute of a state is whatever the court of last resort in such state construes it to be.

McElmoyle vs. Cohen, 13 Pet. 312.

Baueserman vs. Blunt, 147 U. S., 647.

Metcalf vs. Watertown, 153 U. S. 671.

Balkman vs. Woodstock Iron Co. 154 U. S., 177.

So that this court looks not only to the statute but to the decision, of the highest court of the state in order to ascertain what the statute is.

In Kansas the rule is that the bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim, and that action must be taken within a reasonable time; and that, in no event, will such reasonable time be extended beyond the statutory period of limitation.

A. T. & S. F. Railroad Co. vs. Burlingame Township, 36 Kas. 628.

Roric vs. Board of County Commissioners, 46 Kas. 176.

Bauserman vs. Charlotte, 46 Kas. 480.

Kulp vs. Kulp, 51 Kan 391.

And this is the general rule recognized by this court. Bauserman vs. Blunt, 147 U. S. 637.

Counsel for plaintiff in error concedes that the state statute of limitations is applicable. He also recognizes that the action would be barred at some time and in framing the amended petition sought to show an excuse for the delay and thus avoid the bar of the statute. The allegation so relied upon and contained in the amended petition, reads:

"That said assessment was made just as soon as discovered in the exercise of diligence to be necessary and just as soon as it was ascertained the first assessment and assets of the bank were insufficient."

Whether such allegation was sufficient to excuse the delay and to toll the statute of limitations, was the specific question submitted to the Supreme Court of the State of Kansas in the case at bar and was decided by that court adversely to the plaintiff in error.

Rankin, Receiver, vs. Barton 69 Kas. 629.

By statute in the State of Kansas, the Supreme Court is required to and does prepare the *syllabi* and such is made the law of the case. The *syllabi* prepared by the Supreme Court of Kansas in the case at bar reads as follows:

"1. An action to enforce the individual liability of the stockholders in a National bank is governed by the statute of limitations in the state in which it is brought.

2. Ordinarily a cause of action on such liability does not accrue until the comptroller of the currency has ordered an assessment upon the stockholders. But that officer is subject to the rule that where preliminary action is essential to the bringing of a suit upon a claim, and such precedent action devolves upon the claimant, he cannot prevent the operation of the statute of limitations by unnecessary delay in taking such action.

3. When a national bank becomes insolvent it is the duty of the comptroller to make an accounting and determine the necessity and extent of assessments upon stockholders within a reasonable time, and upon his failure so to do the statute of limitations begins to run in favor of stockholders.

4. Where the facts alleged by the receiver disclose that an assessment against stockholders was not made within a reasonable time the admission was not overcome by an averment that the comptroller did exercise diligence and made a second assessment as soon as he ascertained that the first assessment and the assets of the bank were insufficient."

The decision in the case at bar, both by the District Court and the Supreme Court of Kansas, was correct and in harmony with all of the adjudicated cases, save and excepting only Alderich vs. Skinner, 93 Federal, 377, and from which plaintiff in error quotes at length in closing his brief.

While Alderich vs. Skinner, relied upon by plaintiff in error, may at first seem to be against our contention, yet after more careful examination it cannot be so regarded, because the opinion in that case does not disclose what the statute of limitations of the State of Washington is nor how the Supreme Court of that State has construed such statute.

The District Judge who wrote the opinion in that case seems to have regarded it as an original or new proposition and decided it without any reference whatever to authorities.

Certainly there is some limitation to be applied. Counsel for plaintiff in error does not contend that the Comptroller could arbitrarily delay taking action and making the assessment indefinitely, say for fifty years, nor for forty, nor for thirty, nor twenty.

What, if any protection, then is there for the stockholders in cases of delay on the part of the Comptroller? In an action brought by the receiver under the direction of the Comptroller the stockholders cannot question his decision.

On the other hand the Comptroller has the right and power under the statute to make an assessment immediately after the appointment of the receiver.

The effect of delaying action in such cases is

fully considered and discussed in West vs. Topeka Savings Bank, 66 Kas. 527, JUSTICE BURCH, saying:

"It is established law in this State that when some preliminary action is an essential prerequisite to the bringing of the suit, and such action rests with the claimant, he cannot defeat the operation of the statute of limitations by long and unnecessary delay in taking the antecedent step; and the statute will begin to run within a reasonable time after the party could, by his own act, perfect his right, which reasonable time will not, in any event, extend beyond the statutory time fixed for bringing the suit. This doctrine has been stated and re-stated, illustrated and illuminated, applied and re-applied until it has become a truism."

And quoting again from page 530:

"Being insolvent, the duty of the corporation to satisfy its obligations became urgent and imperative. As creditor, it had the power to fix at once its debtor's liability. Delay for a single day was inexcusable, and the statute commenced to run at once."

If the state statute of limitations is to control and if the construction placed upon state statutes by the highest court of that state is binding upon this court, then clearly the decision in the case at bar was correct and (if reviewed by court this at all)should be affirmed.

II.

Has This Court Jurisdiction to Review the Decision of the Supreme Court of the State?

The jurisdiction of this court to review a final judgment or decree in any suit in the highest court of a state is limited to cases in which, "there is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of the statute of, or the authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute or commission held or authority exercised under the United States, and the decision is against the title, right privilege or immunity, especially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

There is no Federal question involved in the case at bar. The only clause of the judiciary act above quoted, which could be held at all applicable to this action is where "there is drawn in question a treaty or statute of or authority exercised under the United States and the decision is against their validity."

The validity of a statute or treaty of the United States is not drawn in question within the meaning of this section every time rights claimed under a statute or treaty are controvertible, nor is the validity of an authority every time an act done by an authority is disputed.

Kennard vs. Nebraska, 186 U. S., 304.

Florida vs. Central Railroad Co. vs. Belle, 176 U. S. 321.

Blackburn vs. Portland Gold Mining Co. 175 U. S. 571.

Telluride Power Co. vs. Rio Grande Western Railroad Co., 175 U. S., 639.

Columbia Water Power Co. vs. Columbia Electric Railway Co. 172 U. S., 488.

Borgmeyer vs. Idlea, 159 U. S., 408.

Bushnell vs. Crooke Mining Co., 148 U. S. 682.

Ferry vs. King County, 141, U. S., 668.

Cook County vs. Calumet Canal Co. 138 U. S., 635.

Baltimore Railroad Co. vs. Hopkins 130 U. S., 210.

In the case at bar there is no question raised as to the validity of the statute, under which the Comptroller acts, nor as to his power to act, but the question is what is the statute of limitations in such cases in the State of Kansas. And this court will not review the decision of the state court construing its own statute of limitations.

Great Western Telegraph Co. vs. Purdy, 162 U. S., 329, in which MR. JUSTICE GRAY, speaking for the court (page 339) said:

"The limitation of acts is governed by the *lex fori* and is controlled by the legislation of the state in which the action is brought as construed by the highest court of that state, and if the legislative act or the judicial construction differs from that prevailing in other jurisdictions, "where the question is not as to validity, but as to the exercise of authority under the United States," a Federal question is not presented.

Walsh vs. Columbus etc. Railroad Co. 176 U. S., 469.

Hamblin vs. Western Land Co., 147 U. S., 531

New Orleans vs. New Orleans Water Works Co., 142 U. S 79.

"Where a state law is admitted to be valid and the only question is whether it has been correctly construed, the Supreme Court of the United States has no jurisdiction."

Congdon Mining Co. vs. Goodman 2 Black (U. S.) 574.

Scott vs. Jones, 5 How (U. S.) 343.

Commercial Bank vs. Buckingham, 5 How (U. S.) 317.

A decision of the State Court resting upon the construction and not upon the validity of a state

statute does not present a Federal question.

Grand Gulf Railroad Co. vs. Marsher, 12 How (U. S.) 165.

Ferry vs. King County, 141 U. S. 668.

Snell vs. Chicago, 152 U. S. 191.

Decisions based on local laws not involving Constitutional questions are not reviewable.

Hibben vs. Smith, 191 U. S., 310.

Smith vs. Indiana 191 U. S., 138.

This court will not review the decision of a state court construing its own statute of limitations.

Harrison vs. Myer, 92 U. S. 111.

In conclusion we respectfully submit that the writ of error should be dismissed because this court has no jurisdiction to review the decision of the Supreme Court of Kansas, no Federal question being presented. And further, in the event of a consideration of the case upon its merits, the judgment of the state court was correct and should be affirmed.

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